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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 602

THE PENNSYLVANIA RAILROAD COMPANY, a corporation; UNION RAILROAD COMPANY, a corporation; THE MONONGAHELA CONNECTING RAILROAD COMPANY, a corporation; ALLEGHENY AND SOUTHERN RAILROAD COMPANY, a corporation; THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a corporation; and THE MONONGAHELA RAILWAY COMPANY, a corporation, *Petitioners*,

v.

JAMES P. McARELL, RUSSELL C. PRICE, RAYMOND P. STANLEY, JOHN B. DEFAZIO, LARRY T. LESTER, RAYMOND C. MOORE, J. F. CHURCHEY, MICHAEL DITKA, MARIO V. MAGLIOCCHETTI, ROY SCHOLENHOLTZ, JAMES McMANUS, TOM DERMOTT, JANE DOE, HARRY ROE and PAUL POE, individuals. *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Pennsylvania Railroad Company, et al., petitioners, pray that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Third Circuit entered on October 1, 1958, granting respondents' motion to dismiss petitioners' appeal in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 258 F. 2d 945 and is printed in the Appendix hereto, *infra*, p. 5a.

The opinion of the District Court is not yet reported, and is printed in the Appendix hereto, *infra*, p. 1a.

The report of the Grievance Committee of the United States District Court for the Western District of Pennsylvania is not reported and is printed in the Appendix hereto, *infra*, p. 6a.

JURISDICTION

The order of the Court of Appeals was entered October 1, 1958. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

Whether the Constitutional right to due process of law, in an equitable action, is violated where, after an agreement of reference to an outside non-judicial tribunal of certain, but less than all, issues as to certain, but less than all, parties for investigation and report, and after the filing with the court of the referee's report, a district judge—

(1) enters final judgment of dismissal, with prejudice, without notice to counsel, without application of counsel for an order of approval, and without affording counsel a hearing on errors of fact or law in the report of the referee, all in violation of the requirements of Fed. R. C. P. No. 53;

(2) *sua sponte*, and without notice to counsel, enlarges the agreement of reference, so that, in-

stead of a reference for investigation and report by the referee on *certain* issues as to *certain* parties, it becomes a reference for final and binding determination by the referee of *all* issues as to *all* parties;

(3) enters final judgment of dismissal with prejudice without notice or hearing, and without permitting either side to be heard in court, in any manner, with respect to any of the issues of fact or law raised by the pleadings which were not included in the agreement of reference or the report of the referee.

CONSTITUTIONAL PROVISION INVOLVED

Amendment V to the Constitution of the United States:

"No person shall be * * * deprived of life, liberty or property without due process of law * * *."

STATEMENT OF THE CASE

Petitioners' case has never been heard upon its merits in any Court. The District Court dismissed the action with prejudice upon its own motion without a hearing (App. p. 1a). The Court of Appeals dismissed the appeal without permitting argument on the merits (App. p. 6a).

On September 28, 1957, the petitioners filed a Complaint in Equity in the Court of Common Pleas of Allegheny County, Pennsylvania, seeking to enjoin James P. McArdle, a member of the bar, and fourteen other defendants, none of them members of the bar, from engaging in an unethical and illegal conspiracy for the solicitation of law business; the lending of money to clients in pending cases; payments to solici-

tors; absorption of costs of litigation; solicitation of powers of attorney by lay defendants for the purpose of retaining defendant McArdle to represent injured employees of petitioners in legal actions, and to enjoin the practice of law by Russell C. Price, one of the non-lawyer defendants, without a license to do so. The complaint was served upon all of the defendants. On September 30, 1957, the equity action was removed to the United States District Court for the Western District of Pennsylvania.

On September 28, 1957, McArdle instituted a suit in the United States District Court for the Western District of Pennsylvania against the petitioners and the Association of American Railroads seeking to restrain the petitioners from interviewing and harassing the said McArdle's clients.

On September 30, 1957, a preliminary hearing was held before Honorable John McIlvaine, United States District Judge, on both actions then pending. After extended discussion, an agreement was reached between counsel and the District Judge that the allegations made by the petitioners against Mr. McArdle should "first" be investigated by the Grievance Committee of the United States District Court and that the counter-allegations of McArdle against the petitioners should be investigated by the United States Attorney for the Western District of Pennsylvania, all proceedings in both actions to be held in abeyance pending their investigations.

The full text of the agreement is reported in the Original Record of the District Court proceedings (Typewritten Transcript, pp. 29-32), and reads in full as follows:

"(*In open court*)

THE COURT: Now, gentlemen, in order that we have the gist of the discussion we have had concerning these cases Civil Actions 16247 and 16246, on the record—and we all understand and agree—I wish to state that Mr. Lewis and Mr. Robb agree that this case involves more than cold legal precedent, that is, it involves the public, the public and the courts are vitally interested in this matter. I think we are all in agreement that our way of life depends on the orderly administration of justice.

In talking it over, we found that primarily this dispute involves the ethical standards of a member of the bar of this court, and the charges of interfering with or harassing or tampering with witnesses.

We are all agreed that courts since time immemorial have regulated and controlled the ethical standards of members allowed to practice in their courts, and that a rather well regulated procedure has been developed by the members of the bar and the courts.

We agreed that the first group in this particular case to consider the ethical practices of Mr. McArdle is the Grievance Committee of this court. We felt that this investigation should be thorough but should be made with all due speed.

We agreed that the court cannot and should not allow anyone, in any manner to unlawfully impede the administration of justice in the United States District Court—or in any court, but we were talking about the United States District Court for the Western District of Pennsylvania. And therefore it is the agreement of all parties to ask the United States Attorney to make a fair investigation of these charges.

We felt that the serious charges raised by the petitioner in this court and the railroads in the

State courts could be properly resolved by the procedures we have outlined. The public's rights and the court's rights will be protected, as well as the petitioner in this court and the parties who are petitioners in the State court action.

The petitioner claims that his practices and procedures are proper. If so, he will remain a proper member of the bar of this court and any cloud will be removed.

Investigation by the United States Attorney of the charges as outlined above would provide an objective approach to the countercharges raised by the petitioner.

We felt, Mr. Lewis, Mr. Robb and myself—Mr. Robb with the approbation of his client, Mr. Lewis with the approbation of his clients,—that nobody could or should ask for more than the result from these procedures.

We felt, that the crux of the controversy boils down to the three practices, the propriety of which should be resolved:

(1) Is it proper for an attorney to maintain by loans a litigant during litigation?

(2) Is it proper for an attorney to pay a per diem and expenses for what petitioners calls a "business getter" and the railroads call "solicitation of business"? The question of solicitation, with or without payment, would be within the scope of the same practice. Or is it proper for an attorney to pay the costs of litigation other than the record costs?

(3) And then the other issue, of course, was brought up to the court, concerning harassment of clients by the railroads.

We agreed that the Grievance Committee of this court, if it does not already have, would have the right to subpoena witnesses and examine books.

We also agreed that the status of pending ac-

tions will be held in abeyance pending the determination of these questions by these authorities.

Have I stated the case right, Mr. Lewis?

MR. LEWIS: Yes, sir.

THE COURT: Mr. Robb?

MR. ROBB: Yes, sir.

THE COURT: Anything that should be said?

MR. ROBB: No. I just wanted to put on the record that the United States Attorney will investigate our charges that we made here in our complaint?

THE COURT: That is right; about harassment and keeping of justice in the investigation of witnesses.

MR. ROBB: If there are any criminal violations involved.

THE COURT: Well, let me say frankly, I asked him to investigate. I have no doubt that the United States Attorney does his duty—a very dear friend of mine and a man for whom I have the highest respect.

MR. LEWIS: Just as the Grievance Committee will investigate charges made in my complaint.

THE COURT: That is correct. And I have also a great deal of faith in the Grievance Committee of this court.

We are all in agreement then. Is that correct, Mr. Lewis and Mr. Robb?

MR. ROBB: Yes.

MR. LEWIS: Yes, Your Honor.

THE COURT: And everything is to be held in abeyance pending these procedures."

The parties then proceeded before the Grievance Committee with the investigation of the petitioners' complaints against McArdle, the lawyer-defendant, *only*. The Grievance Committee undertook no investigation of the petitioners' complaints against the *fourteen non-lawyer defendants*, nor any investigation of

the complaint against defendant Price for practicing law without a license.

On June 24, 1958, the report of the Grievance Committee, dealing with the lawyer-defendant, McArdle, only (App. p. 6a, *infra*), was docketed in the United States District Court for the Western District of Pennsylvania. Among other things, the Grievance Committee determined that it was not proper for an attorney to maintain a client by loans during litigation. It found McArdle guilty of making loans to his clients during litigation, but, since the Grievance Committee had never considered this question before, it recommended no action against McArdle for his previous conduct.

The Grievance Committee did not mention the problem of the alleged practice of law by the defendant Price without a license, nor did it mention any of the other complaints against the fourteen non-lawyer defendants.

On the same day that the Grievance Committee filed its report, June 24, 1958, Judge McIlvaine forthwith "adopted" the report "in all respects" and dismissed the petitioners' complaint on his own motion and with prejudice without notice or hearing (App. p. 1a, *infra*). The Order of Dismissal included not only the complaint against McArdle, which had been referred to the Grievance Committee for investigation, but also the complaint against the *fourteen other non-lawyer defendants,* as to whom no investigation reference to the Grievance Committee had been made.

In so dismissing the action, the District Court violated every relevant provision of Fed. R. C. P. No. 53. No notice was given to any party of the filing of the

Grievance Committee's report. No time was given to any party to prepare written objections thereto. No one applied to the court, by motion and upon notice, for action on the report.

The District Court justified its action upon the sole ground that petitioners' attorney had agreed that the determination of the Grievance Committee would be final and binding as to the liability of *all* defendants, including the fourteen non-lawyer defendants as to whom the Grievance Committee had undertaken no investigation.

The District Court said (App. p. 2a, *infra*):

> "Therefore, it was agreed by John A. Robb, Esq., representing Mr. McArdle, and Mahlon Lewis, Esq., representing the Railroads, that the allegations of the Railroads against Mr. McArdle should be referred to the Grievance Committee of this Court, and the counterallegations of Mr. McArdle should be referred to the United States Attorney for investigation. *It was understood that their determinations of the questions presented in these cases would be final.*" (Emphasis supplied.)

The Grievance Committee never "determined" anything. They made "findings" and a "recommendation" as to McArdle, the lawyer-defendant. They did nothing whatever as to the fourteen non-lawyer defendants including Price.

Petitioners never were granted any opportunity to present their case on the merits before the District Court, either as to McArdle or as to the *other fourteen non-lawyer defendants.*

Petitioners promptly appealed to the United States Court of Appeals for the Third Circuit. Appellees

filed a Motion in the Court of Appeals to dismiss the appeal. Petitioners filed an answer to said motion. Oral argument was had upon the motion on September 15, 1958.

The Court of Appeals on October 1, 1958, dismissed petitioners' appeal. The Court did so on the sole ground of the asserted agreement of counsel, quoting the opinion of the District Court, above-quoted, and concluding:

> "We believe that the District Court was justified in following this course of procedure because of the previous agreement of the parties to have the matter handled in this way." (App. p. 6a, *infra.*)

The Court of Appeals refused to hear argument on the merits of petitioners' complaint, either against McArdle or against the fourteen non-lawyer defendants.

REASONS FOR GRANTING THE WRIT

This case involves important questions of "due process of law" in civil actions including the right of the plaintiffs to a "day in court" and the meaning and enforcement of Fed. R. C. P. No. 53 in equitable matters. The decisions below are in direct conflict with the decisions of this Court.

The questions of "due process" come up under two headings.

(a) The effect of the court's adjudication of the rights of the plaintiffs against the lawyer-defendant McArdle; and

(b) The effect of the court's adjudication of the rights of the plaintiffs against the other fourteen non-lawyer defendants.

Certain matters are germane to both headings; others apply to one of them only.

Petitioners brought an action against McArdle and others for injunction. The Complaint sought no professional disciplinary action against McArdle, and was grounded in equity under the authority of *Atchison, etc. Ry. Co.* v. *Andrews*, 338 Ill. App. 552, 88 N. E. 2d 364 (1949), and similar cases. See 14 A. L. R. 2d 728.

By agreement of counsel and the court, those phases of the controversy which involved the professional behavior of the lawyer-defendant McArdle, and those phases only, were submitted to the Grievance Committee of the local court for investigation and report. The agreement was detailed, specific and limited, and was dictated as part of the record, in open court. However, when the Grievance Committee subsequently rendered its report to the court of its investigation of McArdle only, the court summarily dismissed, without application by any party and without notice or hearing, and with prejudice, *all* of the petitioners' complaints, including those against the non-lawyer defendants which had not been submitted to the Grievance Committee. The court compounded the error by refusing to comply with any of the requirements of Fed. R. C. P. No. 53, which guarantee the "due process" requirements of notice and hearing with respect to any such report, when filed with the court.

The very essence of "due process" is the right to a fair and open hearing to the plaintiffs. Somewhere, sometime, and somehow every plaintiff is entitled to

his "day in court". *Railroad Commission of Calif.* v. *Pacific Gas and Electric Co.* 302 U. S. 388, 393; *Ohio Bell Tel. Co.* v. *Public Utilities Commission*, 301 U. S. 292, 304-5; *Consolidated Gas Co.* v. *Mayer*, 146 Fed. 150 (CC NY, 1906).

The record is clear that the petitioners have never had a day in any court on:

(a) the correctness, in fact or in law, of the Grievance Committee's report on the conduct of the lawyer-defendant McArdle;

(b) any phase whatever of their complaint against the other fourteen non-lawyer defendants.

In a proceeding in equity, it is the duty of the trial court to determine, by its own judgment, the controversy presented. The court cannot of its own motion abdicate its duty and devolve that duty upon any of its officers or any other outside third person. *Kimberly* v. *Arms*, 129 U. S. 512, 524.

If, however, the parties, with the consent of the trial court, agree that the case shall be referred to some non-judicial third party to pass upon *all the issues* in an action for equitable relief, this agreement will be enforced, since it amounts to a "submission of the controversy to a tribunal of the party's own selection." *Kimberly* v. *Arms, supra*: *Davis* v. *Schwartz*, 155 U. S. 631, 637.

However, such submissions, insofar as they result in an abdication of the function of the court to resolve the issues, are narrowly construed; and there must be a definite and particular agreement that "all issues" in the matter are to be referred. In the absence of a clear and definite agreement, specifically including the

words "all issues", the doctrine of *Kimberly* does not apply, and the report of the master or referee or other third person remains of limited scope, with the duty on the court to hear the matter thereafter and to enter its adjudication in accordance with the ordinary rules of due process. *Oleri* v. *Scalzo*, 145 U. S. 578; *Denver* v. *Denver Union Water Co.*, 246 U. S. 178.

Further, even if the agreement of reference is comprehensive enough to include "all issues" and to fall within the *Kimberly* doctrine, there is still a right to have court review of the decision or opinion of the non-judicial outside tribunal. Even where there is a "submission of the controversy to a tribunal of the party's own selection" to resolve "all issues", there still may be a review to see if there has been "manifest error in the consideration given to the evidence, or in the application of the law." *Kimberly* v. *Arms*, *supra*.

Accordingly, petitioners do not attack, in these proceedings, the right or power of a court, in appropriate instances, to refer matters to a master, referee, auditor or to some other third person for disposition. However, the Federal Rules of Civil Procedure, and the decisions of this court, impose certain terms and conditions on any such reference or submission, in order that there will be no abdication of the trial and adjudication functions of the federal courts and in order to assure to the parties the fundamentals of "due process" in connection with the final action of the court upon any such reference or submission.

Petitioners do contend that the action of the courts below, both in their wrongful enlargement of the agreement of reference, and in their violation of every provision of Fed. R. C. P. No. 53(e), have deprived petitioners of due process of law and have denied them their day in court.

The action below is in direct conflict with the decisions of this court in *Kimberly, Davis, Oteri* and *Denver.*

* * * * *

The first point therefore, is—what was the nature and extent of the agreement of reference?

The answer lies in the language of the agreement of reference. There were, before the court at the time of the agreement of reference, three matters:

1. A complaint by the petitioners against the lawyer-defendant McArdle, including allegations which concerned his professional conduct.

2. A complaint by McArdle against the petitioners alleging improper tampering by them with witnesses.

3. Complaints by the petitioners against the fourteen non-lawyer defendants alleging conspiracy with respect to the administration of justice including the practice of law by Price without a license, but in no way involving professional misconduct by any lawyer.

The carefully stated agreement, as it appears of record (p. 5, *supra*), clearly covered points one and two. Just as clearly, it did not cover point three in any respect.

Further, as to points one and two, the reference was narrowly limited.

As to the complaint against McArdle, the lawyer defendant, the Grievance Committee was to be the "first group" to conduct an "investigation" of his conduct (p. 5, *supra*). The reference was only for "investigation" and "report" (App. p. 3a, *infra*). The action as to him was to be held "in abeyance"

pending this investigation by the Grievance Committee.

As to the complaint against the petitioners on the charge of interfering with or harassing or tampering with witnesses, this was to be submitted to the United States Attorney in the Western District of Pennsylvania "to make a fair investigation". This was done to "provide an objective approach to the counter-charges" made by McArdle (pp. 5, 6, *supra*). This action was also to be held "in abeyance".

There is no single word, or combination of words, anywhere in the submission suggesting that "all issues" between the petitioners and McArdle were to be disposed of finally by the Grievance Committee within the *Kimberly* doctrine.

Lastly, there is not one single word anywhere in the submission dealing with the complaint of the petitioners against the fourteen non-lawyer defendants. These were not referred at all.

* * * * *

The second point is,—what did the Grievance Committee do, under the reference and submission?

The Grievance Committee's report answers the question decisively. The *only* complaint made by the petitioners before the Grievance Committee was the complaint against McArdle, the lawyer-defendant. The *only* answer filed by any of the fifteen defendants before the Grievance Committee was the answer of McArdle, the lawyer-defendant. The *only* item reported in the report of the Grievance Committee related to McArdle, the lawyer-defendant. The *only*

recommendation made by the Grievance Committee in its report related to McArdle, the lawyer-defendant.

There is not one word anywhere in the Grievance Committee's report dealing with the complaints of the petitioners against the fourteen other non-lawyer defendants, nor against Price for practicing law without a license. These were not referred at all.

As to McArdle, the Grievance Committee made "findings" (including a finding of guilt on the charge of loans to clients during litigation) and made a "recommendation" (App. p. 9a, *infra*), nothing more.

* * * * *

The third point (and at this point the "due process" question becomes vital) is—what did the district judge do with the Grievance Committee's report?

Fed. R. C. P. No. 53, promulgated by this Court in 1938, carefully prescribes the procedure on such a reference.

First, whether the reference is to a "master", a "referee", an "auditor", or an "examiner", the reference is to be "the exception and not the rule."

Second, Rule 53(c) restates the doctrine of this court's former decisions that the order of reference shall specify or limit the powers which may be exercised thereunder.

Third, Rule 53(e) guarantees "due process", guarantees a day in court to the parties, and excludes an abdication by the trial court of its adjudication function, by designating certain minimum procedural requirements—

(a) when the report is filed with the court, written notice is to be given to all the parties by the clerk.

(b) every party is to have ten days thereafter within which to file and serve written objections with respect to the report.

(c) the court is not to adopt the report except after application by a party, and then only after "notice" and "hearing."

These simple requirements meet every condition of due process. They permit the court to review the report and the action of the "master", and they permit the parties to present every point which may properly be made under the doctrine of *Kimberly, Davis, Oteri* and *Denver, supra.* Of particular importance is that they permit a party to challenge the correctness of the trial court's interpretation of the agreement of reference. See *Denver* v. *Denver Union Water Co., supra.*

Every provision of Rule 53(e) was violated in this case. The clerk of the court gave no notice of any kind to any of the parties respecting the filing of the report. No party was given any opportunity to serve any written objections to the report or to any part thereof. No application was made by any party to the court for "action upon the report" by motion and notice. No "hearing" was held by the court prior to its adoption of the report. *The court never communicated with counsel for either side, following his receipt of the report. The court never met with counsel for both sides again, following the dictation of record of the original agreement of reference.*

Instead, and in direct violation of Rule 53(e)(2), and contrary to the intent and purpose of the agree-

ment of reference, the district judge, forthwith upon receipt of the report of the Grievance Committee, entered a final judgment in the action, in favor of *all fifteen* defendants, dismissing the action with prejudice.

The sole reason given by the court is an alleged agreement of the petitioners. The district judge said:

> "It was understood that their (the Grievance Committee and the U. S. Attorney) determinations of the questions presented in their cases would be final." (App. p. 2a, *infra*).

Accordingly, without notice, application, or hearing, the district judge said that the court:

> ". . . hereby adopts the said report in all respects as its findings . . ." (App. p. 3a, *infra*).

The statement by the district judge of the scope and extent of the agreement of reference as to *all fifteen* defendants, is unsupportable. No such agreement appears in the record; the *only* agreement which does appear flatly contradicts him. First, as to McArdle, there was a reference for "investigation" only, and there is no word in the record to support the statement that petitioners agreed to be bound irrevocably by the report. Second, as to the fourteen other non-lawyer defendants, there was no reference to the Grievance Committee whatever.

As to the violation of Rule 53(e), no clearer violation of due process can be imagined. Final judgment was entered as to *all fifteen* defendants, with no day in court for petitioners on any issue.

* * * * *

The fourth point is—what did the Court of Appeals do on petitioners' appeal?

Following the filing of an appeal by petitioners, the respondents moved to dismiss the appeal. After answer thereto, and argument, the Court of Appeals dismissed the appeal. The sole ground given was the alleged agreement of the petitioners, the Court of Appeals quoting verbatim, and without comment, the wording of the district judge (App. p. 9a, *infra*.) None of the questions raised by the petitioners were considered or answered. The Court of Appeals refused to examine the language of the agreement of reference. The Court refused to consider Rule 53, or the procedure followed by the district judge. The Court refused to recognize the separate problem of the fourteen non-lawyer defendants. There was no discussion of due process. There was only summary dismissal.

* * * * *

Both the District Court and the Court of Appeals have, by a wrongful enlargement of the agreement of reference and by the violation of Rule 53, deprived petitioners of a hearing on the merits of their complaints, both against McArdle and against the fourteen non-lawyer defendants. Although the Grievance Committee at least provided some sort of preliminary hearing on the complaint against McArdle, no tribunal anywhere has heard one word of testimony, or has granted petitioners any day in court, with respect to the complaints against the other fourteen defendants.

To deprive the petitioners of their "day in court" on the merits of their claims on such a record is a clear violation of due process. Flagrantly to ignore every provision of Rule 53(e) compounds the violation.

This Court has already ruled that, if a district judge wrongfully enlarges the scope of an agreement of reference, this Court will examine and construe the agreement and will convict the lower court of error where the agreement, and the effect of the report, have been wrongfully enlarged. This is exactly what happened in *Denver* v. *Denver Union Water Co., supra;* see also *Edward G. Budd Mfg. Co.* v. *C. R. Wilson Body Co.*, 21 F. 2d 803 (C. C. A. 6, 1927).

Actually, this case is even more flagrant than *Denver.* In *Denver,* the district judge at least gave an opportunity to the parties to file exceptions to the report; he was convicted of error in wrongfully overruling the exceptions, as a result of his misinterpretation and wrongful enlargement of the scope of agreement of reference. In the present case, the district judge did not even grant the petitioners an opportunity to file objections to the report, and the Court of Appeals summarily approved. There is a direct conflict with the prior decisions of this Court.

The existence of serious questions of fact and law are apparent on the face of the Grievance Committee's report. Did the Committee properly refuse petitioners access to McArdle's books? (App. p. 8a). Did the Committee properly refuse petitioners the right to call McArdle for examination? (App. p. 8a). Did petitioners have a right to such access and examination in the district court in the further proceedings required therein under Fed. R.C.P. No. 53? Are Findings 2 (a) and 3 (a) of the Committee supported by the evidence? (App. p. 9a). Petitioners have never had a day in any Court on any of these, or any other, questions raised by the report.

All that the petitioners have asked in the courts below is an opportunity for a "day in court" on their

complaints against McArdle and against the other fourteen defendants. This has been denied by the district judge and has been denied by the Court of Appeals. This petition in this Court is the last opportunity the petitioners have to ask for a "day in court" on their claims.

Wholly apart from the private rights of the petitioners and their last-resort appeal to this Court for due process of law, this case is important because:

1. The right to a fair hearing and to a day in court is a fundamental ingredient of due process in civil actions. A violation of this should warrant action by this Court in every instance.

2. The decision below departed so far from the accepted and usual course of judicial proceedings, from the principles laid down by this Court in *Kimberly, Davis, Oleri* and *Denver,* and from the fixed requirements of the Federal Rule promulgated by this Court, that this Court's power of supervision should be exercised.

3. This case provides an opportunity for this Court to declare that the directions of subdivision (e) of Federal R. C. P. No. 53, are mandatory, and that a failure to follow those directions, under circumstances like those present in this case, is a violation of due process of law.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 16246

JAMES P. McARDLE, ESQ., *Plaintiff*,

vs.

AMERICAN ASSOCIATION OF RAILROADS, ET AL., *Defendants*.

Civil Action No. 16247

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Plaintiffs*,

vs.

JAMES P. McARDLE, ET AL., *Defendants*.

Memorandum and Order

James P. McArdle, Esq., a member of the Bar of this Court, filed an action against the American Association of Railroads, a corporation; The Pennsylvania Railroad Company, a corporation; The Aliquippa & Southern Railroad Coampany, a corporation; The Monongahela Connecting Railroad Company, a corporation; The Monogahela Railway Company, a corporation; The Union Railroad Company, a corporation; and The Pittsburgh & Lake Erie Railroad Company, a corporation (hereinafter referred to as the Railroads), at Civil Action No. 16246, seeking an injunction against the Railroads from interviewing any of his clients without his knowledge or taking any action that would impair his representation of his clients, and to restrain them from instituting any action in the Court of Common Pleas of Allegheny County.

At approximately the same time, the Railroads filed an action against James P. McArdle and others at No. 3462, October Term, 1957, in the Court of Common Pleas of Allegheny County, seeking to restrain Mr. McArdle and the others, alleging that there had been solicitation of clients and the maintenance of said clients during trial. There-

upon Mr. McArdle and the other defendants in that action filed a petition at No. 16247 in this Court for removal. The Court after a hearing granted the removal.

The Court had considerable discussions with counsel for both parties both on and off the record, and it was agreed by all that this case involves more than cold legal precedent; that it involves the public, and that primarily this dispute involves the allegations concerning the ethical standards of a member of the Bar of this Court and his countercharges that the Railroads have been interfering with, harassing, or tampering with witnesses. It was agreed by all parties that since time immemorial the Courts have controlled and regulated the ethical standards of members allowed to practice in the Court, and that a rather well regulated procedure has been developed by the members of the Bar and the Courts to see that these regulations were properly enforced. It was agreed that the first group to consider ethical practices of Mr. McArdle would be the Grievance Committee of this Court. It was also agreed that the Court cannot and will not permit anyone to unlawfully impede the administration of justice in the District Court; and, therefore, the allegations that the Railroads impeded the administration of justice in this Court should be referred to the United States Attorney for the Western District of Pennsylvania for his investigation. Mr. McArdle claims that his practices and procedures were proper and that a full investigation would so reveal. The Railroads maintain that their practices were proper.

Therefore, it was agreed by John A. Robb, Esq., representing Mr. McArdle, and Mahlon Lewis, Esq., representing the Railroads, that the allegations of the Railroads against Mr. McArdle should be referred to the Grievance Committee of this Court, and the counterallegations of Mr. McArdle should be referred to the United States Attorney for investigation. It was understood that their determinations of the questions presented in these cases would be final.

Thereupon, the Court referred the matter to the Grievance Committee for investigation with requests that it conduct the same as expeditiously as possible and file a report with the Court. This committee, composed of outstanding members of the Bar of the Court, spent many days in taking testimony and investigating the charges and on June 24, filed their report with this Court. This Court is appreciative of their sincere efforts.

At the time that the Court referred the allegations against Mr. McArdle to the Grievance Committee, it was brought to the attention of the then United States Attorney, D. Malcolm Anderson, now the Assistant Attorney General in Charge of the Criminal Division of the United States Department of Justice, the allegations of Mr. McArdle against the Railroads. Mr. Anderson has advised the Court that he has conducted a complete investigation of these charges and has found no evidence of any violation of the laws of the United States. However, he further advised the Court that the Railroads would discontinue their practice of interviewing litigants who have filed suit against them without notifying the attorney for any of the litigants of their desire to interview a client.

The Court having considered the findings of the then United States Attorney and now Assistant Attorney General in Charge of the Criminal Division, and having complete confidence in the investigative procedures he employed, and his having found that there was no violation of the laws of The United States, the complaint filed by James P. McArdle vs. American Association of Railroads at Civil Action No. 16246 should be and hereby is dismissed with prejudice. Also, this Court having had the opportunity to consider the investigation and the report filed by its own Grievance Committee investigating the allegations against Mr. McArdle and others, hereby adopts the said report in all respects as its findings and directs that the Railroads' complaint filed against James P. McArdle, et al.,

at Civil Action No. 16247 should be and hereby is dismissed with prejudice.

s/ JOHN W. McILVAINE
United States District Judge

Dated: June 24, 1958.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 16247

THE PENNSYLVANIA RAILROAD COMPANY, ET AL., *Plaintiffs*,

vs.

JAMES P. McARDLE, ET AL., *Defendants*.

Order

AND NOW, to wit, this 24th day of June, 1958, it is Ordered and Directed that the report of the Grievance Committee filed with the Court in the above-captioned matter be filed by the Clerk of this Court.

It appearing to this Court that the testimony elicited before the Grievance Committee is of a confidential nature, it is Ordered and Directed that the testimony and exhibits taken before the committee be filed with the Clerk; however, the Clerk is directed to impound the testimony and exhibits, and not permit their release or inspection to any person except upon prior Order of Court. However, the report of the Grievance Committee, which the Court has this date by separate order adopted and approved, being of legitimate public interest, may be made public in the same manner as any other document filed in the Clerk's office.

United States District Judge
s/ JOHN W. McILVAINE

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,675

THE PENNSYLVANIA RAILROAD COMPANY, a corporation; UNION RAILROAD COMPANY, a corporation; THE MONONGAHELA CONNECTING RAILROAD COMPANY, a corporation; ALIQUIPPI AND SOUTHERN RAILROAD COMPANY, a corporation; THE PITTSBURGH AND LAKE ERIE RAILROAD COMPANY, a corporation; and THE MONONGAHELA RAILWAY COMPANY, a corporation, *Appellants*

v.

JAMES P. MCARDLE, RUSSELL C. PRICE, RAYMOND P. STANLEY, JOHN B. DEFAZIO, LARRY T. LESTER, RAYMOND C. MOORE, J. F. CHURCHEY, MICHAEL DITKA, MARIO V. MAGLIOCCHETTI, ROY SCHOENHOLTZ, JAMES MCMANUS, TOM DERMOTT, JANE DOE, HARRY ROE AND PAUL POE.

Appeal from the United States District Court for the Western District of Pennsylvania

Heard on Motion to Dismiss Appeal, September 15, 1958.

Before GOODRICH, STALEY AND HASTIE, Circuit Judges.

Opinion of the Court

(Filed October 1, 1958)

Per Curiam

The appellants appeal from an order made by a judge of the District Court for the Western District of Pennsylvania dismissing, with prejudice, an action brought by the Pennsylvania and the other railroads. The defendants have moved to dismiss the appeal.

The Court is of the opinion that the appeal should be dismissed. It appears that the parties were in two lawsuits in the district court and that pursuant to a conference between their lawyers it was agreed that the allegations made

by the railroads against Mr. McArdle should be referred to the Grievance Committee of the United States District Court for the Western District of Pennsylvania and the counterallegations of Mr. McArdle should be referred to the United States Attorney for the Western District of Pennsylvania for investigation. As stated by the district judge, "It was understood that their determinations of the questions presented in these cases would be final."

The determinations were duly made. The United States Attorney advised the court that he found no violation of any of the laws of the United States. The Grievance Committee, likewise, made a report upon the receipt of which the district court dismissed the complaint against Mr. McArdle and the other defendants.

We believe that the district court was justified in following this course of procedure because of the previous agreement of the parties to have the matter handled in this way. The motion to dismiss will therefore, be granted.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE: Alleged Irregularity or Unethical Practices of the Law Offices of James P. McArdle, Esquire, in Connection with Representing, Handling and Administering Actions in Which He is Counsel of Record Under the Federal Employer's Liability Act.

Report of Grievance Committee

The above matter was referred to the Grievance Committee of this Court by the Honorable Wallace E. Gourley,

Chief Judge of the United States District Court for the Western District of Pennsylvania on October 1, 1957. The charges of irregularity or unethical practices of Mr. McArdle were contained in the Complaint filed in Civil Action No. 16246 by the Pennsylvania Railroad Company, et al, against James B. McArdle, which action is now pending before the Honorable John W. McIlvaine of this Court. In a preliminary proceeding before Judge McIlvaine, the attorney for the Railroads and the attorney for Mr. McArdle stipulated with the Court that the crux of the controversy in Civil Action No. 16246 involved certain alleged practices, the propriety of which should be resolved by the Grievance Committee by answers to the following questions:

"1. Is it proper for an attorney to maintain by loans a litigant during litigation in an F.E.L.A. case?

2. Is it proper for an attorney to pay a per diem and expenses for what petitioner calls a "business getter" and the railroads call "solicitation of business"?

3. Is it proper for an attorney to pay the costs of litigation other than the record costs?"

Pursuant to this stipulation Judge McIlvaine requested the Chief Judge to refer the matter to the Grievance Committee for prompt consideration and disposition.

Accordingly, a panel of the Committee consisting of Louis Caplan, John D. Ray, William A. Meyer, Robert A. Jarvis and Loyal H. Gregg conducted hearings or held meetings on: October 18, October 25, November 7, December 6 and December 13, 1957 and on January 3, January 17, January 18, February 24, April 10, May 2 and May 15, 1958.

At the Committee's request, Counsel for the Railroads filed a Complaint setting forth allegations of each of the three practices under question in 3 or 4 specific cases which were representatives of an additional number of similar

cases in which the Railroads claimed there were improprieties. Counsel for Mr. McArdle filed an Answer wherein it was admitted that from time to time loans had been made to certain clients and all other allegations in the Complaint were denied.

Before proceeding with his evidence Counsel for the Railroads requested permission to examine Mr. McArdle's books and records ". . . specifically with reference to the extent to which he maintains clients and the amount, the extent to which he absorbs costs and the amount, and the extent to which he makes payment of per diem and expenses to sources of business and the amount of those payments."

The Committee denied this Request for Discovery because good cause was not shown; it was the opinion of the Committee that evidence of the specific allegations of misconduct must be heard before any consideration should be given to the question of the extent of certain practices. Because of the nature of the proceedings the Committee also refused to permit Counsel for the Railroads to examine Mr. McArdle.

After having heard the testimony of 14 witnesses called by the Railroads and after having considered all of the evidence produced in support of the specific allegations of misconduct contained in the Complaint and after arguments by Counsel the Committee makes the following findings:

1. It is not proper for an attorney to maintain by loans a client during litigation. In cases of extreme needs funds may be advanced to the plaintiff by the plaintiff's attorney upon prior approval by the Court after notice to all parties in interest.

(a) The evidence and the pleadings establish that Mr. McArdle has, from time to time, made loans to his clients during litigation.

The propriety of an attorney maintaining his clients by advances or loans during the period of litigation has not previously been passed upon by this Committee. There have been some inconsistent rulings in other jurisdictions where the question has been raised.

For these reasons it is the recommendation of this Committee that no action should be taken against James P. McArdle or any other member of the Bar of this Court for having made such loans to litigants prior to the date of the approval of this Report by the Court.

2. It is not proper for an attorney to pay a per diem and expenses to a "business getter" or a "solicitor of business."

(a) The evidence does not establish any practice on the part of Mr. McArdle of making such payments.

3. It is proper for an attorney to pay the cost of investigation and preparation in connection with the trial of a case. It is not proper for an attorney to pay any other costs of litigation and if he does advance such other costs he should seek reimbursement from his client.

(a) The evidence does not establish the improper payment of costs by Mr. McArdle.

4. The evidence presented in the representative cases does not justify the discovery or the cross-examination of Mr. McArdle requested by the Railroads, nor further hearing by this Committee of the additional cases referred to in the Complaint.

Dated: June 20, 1958.

LOUIS CAPLAN
JOHN D. RAY
WILLIAM A. MEYER
ROBERT A. JARVIS
LOYAL H. FREGO
Grievance Committee